

Service Date: March 21, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application of)	UTILITY DIVISION
MONTANA POWER COMPANY for Approval)	
of a Power Purchase Agreement with Rocky)	DOCKET NO. D2001.7.93	
Mountain Power, Inc.	)	ORDER NO. 6361b
IN THE MATTER of the Application of	)	UTILITY DIVISION
NORTHWESTERN GENERATION I, LLC for)	
Comment and Findings on a Power Purchase	)	DOCKET NO. D2001.9.123
and Sales Agreement with the Montana	)	ORDER NO. 6371a
Power Company)	
IN THE MATTER of the Petition of	)	UTILITY DIVISION
ROCKY MOUNTAIN POWER, INC.)	
for PSC Review and Comment on	)	DOCKET NO. D2001.9.127
Power Purchase Agreement with	)	ORDER NO. 6375a
Montana Power Company)	
IN THE MATTER of the Petition of	)	UTILITY DIVISION
THOMPSON RIVER CO-GEN, LLC)	
for PSC Review and Comment on	)	DOCKET NO. D2001.10.137
Power Purchase Agreement with	)	ORDER NO. 6383a
Montana Power Company)	
IN THE MATTER of the Application of	)	UTILITY DIVISION
THE MONTANA POWER COMPANY's)	
1) Approval of the Default Supply Portfolio, and	)	DOCKET NO. D2001.10.144
2) the Projected Electric Cost Tracking for the	)	ORDER NO. 6382b
12-Month Period Beginning July 1, 2002.)	

ORDER ON PROVIDERS' CLAIMS OF CONFIDENTIALITY

Introduction

By this Order the Montana Public Service Commission (Commission) determines whether information covered by protective orders in these dockets may lawfully be protected, or must be made public.

Background

Pursuant to § 69-8-210, MCA, the Commission is currently processing the “portfolio docket,” Docket No. D2001.10.144, a contested case in which it will be determined whether the costs of Northwestern Energy’s (NWE)¹ default supply portfolio have been “prudently incurred” and should be “fully recoverable in rates.” § 69-8-210(4)(a), MCA. In response to a motion from NWE and after determining that NWE met certain threshold pleading requirements pursuant to Commission protective order rules, ARM 38.2.5001 – 5030, the Commission issued Protective Order No. 6382 on October 30, 2001 to cover information filed in the portfolio docket claimed confidential by NWE. A substantial amount of information initially claimed confidential by providers has been released by providers and is open to the public.

Prior to the NWE portfolio filing the Commission received four filings, either from NWE or potential electricity producers, asking for Commission action or comment: In the Matter of the Application of Montana Power Company for Approval of Power Purchase Agreement with Rocky Mountain Power, Inc., Docket No. D2001.7.93; In the Matter of the Application of NorthWestern Generation I, L.L.C. for Comment and Findings on a Power Purchase and Sales Agreement with the Montana Power Company, Docket No. D2001.9.123; In the Matter of the Petition of Rocky Mountain Power, Inc. for PSC Review and Comment on Power Purchase Agreement with Montana Power Company, Docket No. D2001.9.127; In the Matter of the Petition of Thompson River Co-Gen, L.L.C. for PSC Review and Comment on Power Purchase Agreement with Montana Power Company, Docket No. D2001.10.137. In each of these dockets the Commission issued a protective order, generally covering claimed confidential information in proposed power purchase agreements between NWE and potential electricity producers.² The information filed with the Commission in these dockets has also been filed in the portfolio docket.

On February 19, 2002, on its own motion and pursuant to ARM 38.2.5008(3), the Commission voted to challenge the provider claim of confidentiality in Docket Nos. D2001.7.93,

¹ Montana Power, L.L.C., dba NorthWestern Energy, is the successor of The Montana Power Company, which filed the proposed default supply portfolio on October 29, 2001.

² Protective Order No. 6361, Docket No. D2001.7.93; Protective Order No. 6371, Docket No. D2001.9.123; Protective Order No. 6375, Docket No. D2001.9.127; Protective Order No. 6383, Docket No. D2001.10.137.

D2001.9.123, D2001.9.127, D2001.10.137 and D2001.10.144. On February 20, 2002 the Commission issued Notice of Commission Action, Notice of Required Response, Notice of Opportunity to Respond in all the dockets, save D2001.10.137. The Notice states in part:

Each providing party identified above must respond to this Notice by March 6, 2002. Responses must indicate specifically the information or documents that have been filed with the Commission as proprietary pursuant to each protective order, and must indicate whether each item of information or document can either be released to the public, or must remain protected. If it is the contention of a providing party that information or documents must remain protected, the providing party must fully and carefully explain the legal basis for such protection. Failure of a providing party to respond by March 6, 2002 will result in the immediate release of information covered by the relevant protective order.

Parties to these dockets, other than the providing parties, may, but are not required to, respond by March 6, 2002. In addition, other interested persons, neither providing parties nor parties to the dockets, may respond by March 6, 2002.

On February 22, 2002, the Commission issued an Amended Notice of Commission Action, Notice of Required Response, Notice of Opportunity to Respond, in order to include Docket No. D2001.10.137 and correct an oversight in the first Notice. The deadline for responding to the Amended Notice was March 8, 2002.

The Commission received three responses to the Notices: NWE filed Comments in Support of Protecting Information Filed Under Its Protective Order, including affidavits and sworn statements from those with an interest in protection, and a list and location of the specific information still claimed confidential; Northwestern Generation I, L.L.C. (NorthWestern I) filed a Response Opposing Loss of Confidentiality Protection of Protective Order, with an accompanying affidavit; several Montana media entities³ submitted a joint response contending that the information covered by the protective orders should be made public.

³*Great Falls Tribune, Billings Gazette, Montana Standard, Helena Independent Record, Missoulian, Big Sky Publishing, Inc. dba Bozeman Daily Chronicle, the Montana Newspaper Association, Miles City Star, Livingston Enterprise, Yellowstone Public Radio, the Associated Press, Inc., and the Montana Broadcasters Association.*

It will not be necessary to discuss further Docket Nos. D2001.7.93, D2001.9.123, D2001.9.127 or D2001.10.137. The information covered by the protective orders in those dockets has either been disclosed or has been filed in the portfolio docket (D2001.10.144) and is covered by Protective Order No. 6382.

Discussion and Findings

Legal Basis for Protection

Both NWE and NorthWestern I claim protection for the information as trade secret. This discussion is limited to that claim and does not address other bases for protection, if there are any.

The Commission may protect trade secrets. “The commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, required to carry out its regulatory functions.” § 69-3-105(2), MCA. The only question the Commission needs to answer here is if the information in the portfolio docket claimed confidential by NWE and covered by Protective Order No. 6382 is trade secret. If yes, the information remains protected; if not, it must be disclosed to the public unless another basis for protection is asserted and demonstrated. NWE, as the provider of confidential information, has the burden of demonstrating that the information is entitled to protection. ARM 38.2.5008(4).

Trade Secret

The definition of trade secret at § 30-14-402(4) is as follows:

- (4) “Trade secret” means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use; and
 - (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

This definition is based on the Uniform Trade Secrets Act, “promulgated by the National Conference of Commissioners on Uniform State Laws.” § 30-14-401 – 409, MCA (Annotations), p. 1089. There are no Montana cases discussing and applying the

definition of trade secret. Therefore, the Commission must apply the definition to the information at issue using the argument and evidence submitted in response to its February 20, 2002 (and February 23, 2002) Notice.

Protected Information

In response to the Commission Notice NWE filed a list of the information it continues to claim confidential, divided into four categories: 1) redacted contract information (primarily dispatch on variable cost information, but also including certain other information); 2) bid and pricing information; 3) transmission interconnection feasibility studies; and 4) large customer load information.

Summary of Harm Alleged

NWE and others, through arguments in briefs and affidavits, maintain generally that the following economic harm or competitive disadvantage will occur if the information is disclosed. 1) If dispatch or variable cost information of power plants is disclosed NWE, and ultimately its customers, will be harmed because NWE will not be able to “optimiz[e] short-term purchases and sales to minimize the overall cost of the portfolio.” Pascoe Affidavit, para. 5. 2) Knowledge of certain pricing information allows competitors to bid based on that knowledge, thus distorting the competitive process to the detriment of NWE and default customers. 3) Disclosing certain bid information, either from successful or unsuccessful bidders, will harm the provider in other competitive solicitations. Generally, disclosure of such information “would have a chilling effect on the RFP process and the ability of NWE to obtain the best projects and prices.” NWE Response, p. 14. 4) Disclosing transmission interconnection studies and large customer load information would work to the competitive advantage of entities competing with marketers, potential producers and large customers. Further discussion of the economic harm that would result from disclosing the protected information is contained in the responses of NWE, NorthWestern I, and accompanying affidavits.

Decision

When the Commission challenged the protected information on its own motion it invited an adversarial process. The providers of the protected information had the burden of coming forward to demonstrate, by arguing the facts and the law, that the information

may lawfully be withheld from public disclosure. In response, any other person or persons with standing had the opportunity to come forward and demonstrate the contrary. The providers of the information have met their burden. The media entities responded as follows: “Based on their understanding of what is contained in the currently withheld documents, Petitioners [media entities] do not believe the documents raise any issues of individual privacy, nor that they contain trade secrets as has also been claimed.” Media Response, p. 2. This conclusory statement, neither argument nor evidence, does not challenge the burden carried by the providers, and establishes no record on which the Commission can find that the information is not trade secret.

A trade secret must first be information. The term “information” is extremely broad: “Trade secrets can range from customer information, to financial information, to information about manufacturing processes to the composition of products. There is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.” Thomas J. Collin, *Determining Whether Information Is a Trade Secret Under Ohio Law*, 19 U.Tol.L.Rev. 543, 545 (1988), quoted favorably at U S WEST Communications v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa, 1993). The Commission finds that the matter protected in the portfolio docket is “information.”

In order to be protected as trade secret, information must in fact be secret. Motor City Bagels v. American Bagel Company, 50 F. Supp. 2d 460 (D.Md. 1999). If publicly disclosed, information cannot be trade secret. Lucas City Board of Commissioners v. Ohio Environmental Protection Agency, 724 N.E.2d 411 (Ohio, 2000). The Commission is not aware of allegation or evidence indicating that any of the information protected in the portfolio docket has previously been publicly disclosed. Therefore, the Commission finds the information is secret.

Secret information must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” § 30-14-402(4)(b), MCA. By affidavit and argument the providers have explained their efforts to maintain the secrecy of the information. In the absence of any argument or evidence to the contrary, the Commission finds their efforts reasonable.

Secret information that is the subject of reasonable efforts to maintain its secrecy may not be trade secret if it is “readily ascertainable by proper means.” § 30-14-402(4)(a), MCA. “Readily ascertainable” is obviously subjective. One court has found that “where the duplication or acquisition of the alleged trade secret information requires substantial investment of time, expense, or effort, such information may be found ‘not being readily ascertainable.’” Amoco Production Co. v. Laird, 622 N.E.2d 912, 919 (Indiana, 1993). The Commission finds no basis to conclude that the information at issue is “readily ascertainable.”

To be “trade secret” information must derive “independent economic value” from the fact of its secrecy. § 30-14-402(4)(a), MCA. This element has been found to “carr[y] forward the common law requirement of competitive advantage.” Electro-Craft Corporation v. Controlled Motion, 332 N.W.2d 890, 900 (Minnesota, 1983). By argument and affidavit the providers have asserted that access to the information would create competitive advantage for those obtaining the information and competitive disadvantage for those disclosing the information. There has been no argument presented to the contrary. The Commission finds that the providers derive economic value from the secrecy of the protected information.

Conclusions of Law

1. All findings of fact are hereby incorporated as conclusions of law.
2. The Commission may issue protective orders “when necessary to preserve trade secrets, as defined in [§] 30-14-402[, MCA], required to carry out its regulatory functions.” § 69-3-105(2), MCA.
3. A provider of information necessary to a Commission function may request a protective order pursuant to Arm 38.2.5001 – 5030, MCA.
4. A Commission protective order does not constitute a final determination that information covered may lawfully be protected. ARM 38.2.5008(3).
5. The Commission may challenge a claim of confidentiality on its own motion. ARM 38.2.5008(3).

6. The Commission lawfully challenged protected information covered by Order No. 6361 (Docket No. D2001.7.93), Order No. 6371 (Docket No. D2001.9.123), Order No. 6375 (Docket No. D2001.9.127), Order No. 6383 (Docket No. D2001.10.137), and Order No. 6382 (Docket No. D2001.10.144), and issued a notice requiring the providers to justify protection, and provided the opportunity for anyone with standing to respond. ARM 38.2.5008(3)(a).

7. Providers of confidential information have the burden of demonstrating that the information is entitled to protection under the law. ARM 38.2.5008(4).

8. In response to Commission Notice the providers of information covered by Order Nos. 6361, 6371, 6375, 6382, and 6383 met their initial burden of demonstrating that the protected information is trade secret.

9. No entity having submitted argument and evidence that the information covered by the Order is not trade secret, the Commission finds as a matter of law that the protected information is trade secret.

Order

Information claimed confidential pursuant to Commission Order Nos. 6361, 6371, 6375, 6382 and 6383 is trade secret and may not be disclosed to the public.

DONE AND DATED this 19th day of March, 2002, by a vote of 3 to 2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner, Voting to Dissent

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner, Voting to Dissent

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)